91-2058

Supreme Court, U.S.
FILED
JUN 1 1992
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

LARRY E. COLLINS, JOHN K. GRAUBERGER, PHIL J. CHAPPLE, et al.,

Petitioners,

against

BURLINGTON NORTHERN RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Plaintiff's Petition for Rehearing was arbitrarily denied on March 9, 1992. A look at the record shows some confusion in the office of the Clerk of Court of the Ninth Circuit and of the Montana District, Billings Division. The Memorandum and Order was entered in the federal district court in Billings, Montana on February 3, 1992. The Petition for Rehearing was mailed by Federal Express from Billings, Montana on February 15, 1992. It was delivered in San Francisco not later than February 17, 1992. This was within the statutory time set forth in Rule 40 of the Rules of Appellate Procedure. The Court rejected the filing and Plaintiff filed a Motion on February 22, 1992 to recall the mandate and grant leave to file Petition for Rehearing. This request was denied on March 9, 1992. Two pages of the Opinion with the

mandate affixed were received by the attorney for Plaintiffs on February 5, 1992. The mandate is in violation of Rule 41 of the Rules of Appellate Procedure. In view of the confusion and mis-filing, the Clerk of the Ninth Circuit should be ordered to file the Petition for Rehearing and the case proceed accordingly.

2) On Appeal, Plaintiffs requested, in the alternative, that the Ninth Circuit Court review the findings of the arbitrator. They did not do so and the matter should be returned to the Ninth Circuit Court for a complete adjudication on its merits.

PARTIES DISCLOSURE STATEMENT

Larry E. Collins, John K. Grauberger, Phil J. Chapple, et al., Petitioners, furnish the following list in accordance with the Rules of the Supreme Court of the United States 14.1(b):

Larry E. Collins; John K. Grauberger; Phil J. Chapple; Michael L. Bale, Bill L. Banks, Douglas E. Berg, S. Berumen; Wayne A. Berumen; Dennis L. Besel; R.M. Blohm; George B. Bradley; Donald W. Britton; Alex A. Cantrell; William E. Carruthers; Gary E. Carter; Rick N. Caton; Margaret A. Chilcote; James M. Cotter; Nate E. Daniels; Hal G. Dantic; Randy B. Dawson; Leslie B. Deines; Richard P. Demaray; Roger D. Demaray; Eusebio Diaz; Robert H. Diede; James W. Dietz; G.G. Edelman; Bruce E. Edwards; R.T. Ehresman; Richard S. Elsenpeter; Douglas E. Engebretson; Jan S. Findlay; Gary R. Fleming; Danny J. Fox; D.B. Frickel; Lonny R. Frickel; Steve R. Frickel; John W. Goetz; C.M. Golden; Kenneth W. Goodman; Rick H. Gratwohl; Mary E. Hamlin; William A. Hardy; Luke A. Harnish; Dennis W. Harper; Randy Harper; Terrence L. Harris; Del A. Henman; Ronald A. Herman; W.J. Hess; Harley D. Hettinger; Wallace G. Hill; Dale A. Holzheimer; Owen A. Johnson; Ronn Johnson; Ben R. Kamerzel; Doug H. Kautz; Thomas W. Kenaley; Van O. Durfee; Kenneth R. Knop; Duane E. Kroll; Ron Kroll; Steven W. Krum; Kon H. Kunnemann; Terry G. Lawver; Terry L. Lenhardt; Gary M. Loeffler; William H. Louis; James W.

Martens; Ramin W. Massing Jr.; Jeffrey S. McCuin; Douglas J. McJunkin; Dennis A. Messer; Thoms A. Mikes; Michael K. Miller; G.J. Minch; Larry A. Minch; John R. Molyneaux; Scott A. Moore; Joe Morin; David C. Nelson; Mithcell S. Neumann; Dennis C. Nunn; Timothy P. O'Connell; John S. O'Neil; David M. O'Rear; Jonathan E. Ott; Gary D. Padilla; David H. Parenteau; Buddy Passmore; Ted N. Proctor; Maurice S. Propp; Ronald A. Quarterman; John W. Raiha; Gary G. Raitt; Frank F. Raville; Dale A. Renee; Pam Revell; Bruce D. Richardson; D.A. Rider; Alan W. Riesinger; Mark J. Schilling; Dale R. Schneider; Harold L. Schober; Steve D. Schreiner; Edward A. Schuppe; Gerhardt Schutz; Leonard L. Schutz; Thomas E. Shunkwiler; Ray W. Southworth; John H. Spint; Rick J. Stabio; Steven J. Steffans; Timothy S. Steffans; Gary L. Strever; Gregory F. Thomas; Richard L. Tippie; Barry S. Ungefug; Randy Vanberg; Anthony J. Verdi; Dale Virts; Alexander S. Vogel; Elroy D. Volmer; Robert D. Volmer; Alan J. Waddell; James J. Wegh; Steven E. Wegner; Mathias J. Weiss Jr.; Ray B. Wells; Larry J. Weninger; Leonard M. Wombolt; Walter J. Wright.

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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1991

No. _____

LARRY E. COLLINS, JOHN K. GRAUBERGER,
PHIL J. CHAPPLE, et al.,

Petitioner,

against

BURLINGTON NORTHERN RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on February 3, 1992. Refusal to

file Petition for Rehearing filed on March 9, 1992.

OPINIONS BELOW

The Memorandum Opinion and Order for dismissal of the District Court of the District of Montana, Billings Division holding that the Petitioners' Complaint is dismissed, that stay is not to be lifted, and that arbitrator's decision will not be reviewed, is found in Appendix Exhibit "A". The Opinion of the Circuit Court of Appeals affirming the judgment of the District Court is found in Appendix Exhibit "A". The Refusal of the Circuit Court of Appeals to permit a filing of Petition for Rehearing is found in Appendix Exhibit "A".

JURISDICTION

The order and decision of refusal to file Petition for Rehearing by the United States Court of Appeals was entered on March

9, 1992. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Rule 40 of the Federal Rules of Appellate Procedure provides:

> "(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case."

Rule 41 of the Federal Rules of Appellate Procedure provides:

> "(a) Date of Issuance. The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order."

STATEMENT OF THE CASE

This case is a continuation of an earlier appeal, Collins, et al. vs. Burlington Northern Railroad, 867 F.2d 542 (9th Cir. 1989). This case involves an action brought by the Petitioners, Collins, Chapple, Grauberger, et al., who were employees of the Respondent Burlington Northern, and who were

protected under the St. Louis-San Fransico Railway Merger on November 21, 1980. The Interstate Commerce Commission imposed certain employee protective conditions in its Order approving the Frisco Merger as required by 49 U.S.C. Section 11347. The benefits imposed are set forth in New York Dock Railway-Control-Brooklyn Eastern District Terminal, 360 ICC 60 (1979). The Petitioners hereinabove were furloughed by the Respondent. This case was filed in federal district court in Montana on August 21, 1985. The federal district court dismissed the case on July 21, 1987 and an appeal was filed with the Ninth Circuit Court of Appeals on August 25, 1987. The prior case of Collins, supra, was decided in 1989 stating that arbitration with the Petitioners was mandatory on the part of the Respondent. Pursuant to the Orders of the Ninth Circuit Court of Appeals on February 2,

1989 and May 18, 1989, the parties herein were ordered to pursue the administrative remedy of arbitration by mandate of this Court, and determine the benefits due to the Petitioners.

Accordingly, on July 21, 1989, Judge James Battin ordered a stay in the federal court proceedings until the arbitration matter had been completed. A neutral arbitrator, Joseph A. Sickles, was appointed by the federal district court's order, to the committee consisting of Joseph P. Hennessey, employee representative and Wendell Bell, carrier representative, with an order for the neutral arbitrator to report back to the federal district judge. An arbitration hearing was held in Billings, Montana, on May 1 & 2, 1990, before the committee. The committee met in Denver, Colorado on June 28, 1990 to discuss the opinion of the committee. In pursuant thereto, the neutral arbitrator rendered his

decision ignoring the mandate of the Ninth Circuit Court of Appeals in Collins, supra, and a prior ruling of the Eighth Circuit Court of Appeals in Cosby v. ICC, 741 F.2d 1077 (8th Cir. 1984).

On July 10, 1990 Joseph A. Sickles submitted his opinion to the committee. This opinion was objected to by the employee representative, Joseph P. Hennessey on July 19, 1990 with an Employees' Request for Modification of Decision, which was submitted to the committee. Joseph A. Sickles re-affirmed his decision on July 30, 1990. On August 6, 1990 Joseph P. Hennessey, attorney for the Petitioners, filed with the federal district court in Montana a Plaintiffs' Status Report. Also filed with the status report was a dissenting opinion concerning the arbitration committee's decision.

Thereafter, the Petitioners submitted a

motion to the federal district court asking that the stay be lifted, that the Court reject the decision of the neutral arbitrator and that the motion to dismiss by the Defendant (Respondent) be reversed on the grounds that all administrative remedies had been exhausted. The federal district court denied the Petitioners' motions in Orders dated October 11, 1990 and December 14, 1990.

On January 11, 1991, Petitioners filed a Notice of Appeal and Petition for Review of the findings of Joseph A. Sickles with the Ninth Circuit Court of Appeals.

On February 3, 1992 the Memorandum and Order of the Ninth Circuit Court was filed in the federal district court in Montana. The Memorandum and Order are clearly marked as filed on December 20, 1991 on the front page and stamped January 30, 1992 on the back page by the Clerk of the Ninth Circuit Court. The

Judgment stamped by the federal district court clerk, was done on February 3, 1992.

On February 15, 1992, Petitioners mailed to the Ninth Circuit Court of Appeals, a Petition for Rehearing, by Federal Express with the Court receiving the Petition no later than February 17, 1992. A Motion to Recall Mandate and for Leave to File Petition for Rehearing was filed by the Petitioners on February 22, 1992.

The Order by the Ninth Circuit Court denying Rehearing Request was filed on March 9, 1992.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit Court of Appeals erred on March 9, 1992 when they denied the Request for Rehearing because the Petition was allegedly filed late and the mandate had issued.

An examination of the date sequence set

forth herein shows the Petition was timely mailed and was received in San Francisco on February 16, 1992 and filed in the Circuit Court of Appeals on February 18, 1992. February 17, 1992 was a holiday so this Petition was filed on time. The mandate as is apparent from this record was prematurely entered in violation of Rule 41 of the Federal Rules of Appellate Procedure. We respectfully submit that certiorari should issue at this point ordering the Ninth Circuit to file the Request for Rehearing and the case proceed accordingly.

Certiorari should also issue requesting the Ninth Circuit Court of Appeals to review the findings of the neutral arbitrator, Joseph A. Sickles, in this case.

If the District Court of Montana has no jurisdiction to review the findings of an arbitrator under the facts of this case, then

Petitioner is entitled to a review by the Ninth Circuit Court of Appeals.

In their Petition to ReOpen, the Plaintiffs, in Cosby, state that "It appears the decision of an arbitrator in a merger protective case involving the Interstate Commerce Act constitutes a "final order" of the ICC. See United Transportation Union v. Norfolk & Western R.R. Co., 822 F.2d 1114 (D.C. Cir. 1987)."

However our instant case is different and distinguishable from Cosby, supra, on the point that this case has never been in the agency, to-wit, the Interstate Commerce Commission. This point was argued in the Petitioners' Memorandum in Support of Motion to Reconsider filed in the federal district court. The Petitioners' position is that this instant case is different from United Transportation Union v. Norfolk, supra, in

that an arbitral award is subject to the jurisdiction of the federal district court. Particularly since the Ninth Circuit Court of Appeals conferred jurisdiction upon the federal district court in this case and rejected the Respondent's argument in their Petition for Rehearing in Collins v. Burlington Northern, supra, and rejected the argument contained in United Transportation Union v. Norfolk case. The federal district court in their Order of December 14, 1990 states in part:

"...In the present case, plaintiffs' seek reconsideration to prevent this Court from erroneously relying on the United Transportation Union case. Plaintiffs maintain that the Ninth Circuit Court had considered this case in prior proceedings and had rejected its holdings.

Even assuming that plaintiffs' contentions are correct and that the Ninth Circuit Court did reject the holding of United Transportation Union, the Court finds that this does not justify granting plaintiffs' Motion for Reconsideration...

...any disapproval of the United Transportation Union decision expressed by the

Ninth Circuit Court has no application to the questions decided by this Court...
...the Court will not alter its conclusion that an "arbitrator's award," made pursuant to 49 U.S.C. Section 11347 and New York Dock, "is treated as an order of the Interstate Commerce Commission."

There is no question that the Petitioners have a right of review. Where does this review belong?

This case did not go to the neutral arbitrator to determine if the employees-petitioners had any rights, but what rights/benefits were due the employees-petitioners. Those rights were spelled out in the Frisco Merger.

The Eighth Circuit Court of Appeals spelled this out in Cosby v. ICC, 741 F.2d 1077, 1084 (8th Cir. 1984);

"In our view, the FTC employees are entitled to the benefit of the protective conditions heretofore made available to the employees of the BN and the Frisco because they are employees who were affected by the merger within the meaning of the Act; and, alternatively, because it was an abuse of discretion on the part of the commission to

deny them benefits in light of the representations made by the railroads at the time of the merger."

In a reversal of the same Joseph A. Sickles, the Interstate Commerce Commission held as follows:

"...Former employees of Frisco Transportation Company (FTC), a motor carrier subsidiary of the St. Louis-San Francisco Railway Company (Frisco), seek review of an arbitration decision and award to the extent it did not grant their claims for fringe benefits,...
...Petitioners were employees of FTC at the time Frisco merged with BN. Following court remand in Cosby et al. vs. ICC,...the Commission granted former FTC employees the level of labor protection prescribed in New York Dock Ry.-Control-Brooklyn Eastern Dist.,...The matter at issue here concerns what level of fringe benefits the former Frisco employees, all in active service at the time of the merger, are entitled to under New York Dock, supra....
...We conclude that the arbitrator's decision as to fringe benefits incorrectly interpreted the language of New York Dock, supra. The matter of fringe benefits should be remanded to the panel to determine the amount due the petitioners."

Burlington Nor., Inc.-Cont.&Merg.-St.L.-Sn Fran. Ry.Co., Finance Docket No. 28583, 6 ICC2d 351 (Decided: January 18, 1990).

An order should be made by some court to

the arbitrator to determine the benefits due these Petitioners.

The Ninth Circuit Court of Appeals can do it directly because litigation must come to an end.

It can be returned to Judge Battin in federal district court with instructions to have this matter handled in accordance with previous rulings of this Court in this matter.

All the law cited in the Opinion of the District Court is good law if the case originated in the Interstate Commerce Commission. This case did not.

The law controlling in this instant case is set forth in:

Collins v. BN, 867 F.2d 542 (9th Cir. 1989);

Collins v. BN Rehearing Opinion, Filed May 18, 1989;

Cosby v. ICC and Burlington Northern,

Intervenor, 741 F.2d 1077 (8th Cir. 1984);

Cosby-ICC Opinion in Burlington Nor.,Inc.-Cont. & Mer.-St.L.-San Fran. Ry. Co., Docket No. 28583, 6 ICC2d 351 (Decided: January 18, 1990).

We have a conflict in this case. If in fact this case is deemed to be under the holding in United Transportation Commission v. Norfolk and Western Railway co., 822 F.2d 1114, (D.C. Cir. 1987), cert. denied, 484 U.S. 1006 (1988) (citing 28 U.S.C. Section 2342). "Since 1975, ICC orders have been subject to direct review in the court of appeals." Owner-Operators Independent Drivers Ass'n v. Skinner, 931 F.2d 586 (9th Cir. 1991), then under the Petition for Review filed by Petitioners on January 11, 1991, the Ninth Circuit Court of Appeals should review the findings of the arbitrator, Joseph A. Sickles.

The holding in the case of Employees of

the Butte, Anaconda & Pacific v. U.S., 938 F.2d 1009 (9th Cir. 1991) is not applicable to the record in this case. It is an appeal from a ruling of the Interstate Commerce Commission sustaining the arbitrator, Joseph A. Sickles in an order over-ruling the findings of a previous arbitrator Cassle.

This Court held in Peters v. Burlington Northern R. Co., 931 F.2d 534, 541 & 542 (9th Cir. 1990):

"Burlington Northern argues that the district court lacks authority to exercise jurisdiction over Peter's claims against it, asserting that under the Railway Labor Act these claims may only be handled through arbitration. However, if an employee alleges inadequate union representation, a district court can in some circumstances exercise jurisdiction over the employee's claim against his employer. See Glover v. St. Louis-San Francisco Railway, 393 U.S. 324, 329-30, 89 S.Ct. 548, 551, 21 L.Ed.2d 519 (1969).....Ninth Circuit authority supports the view that in this case Glover is applicable.
...In the instant case, if the union indeed breached its duty of fair representation, the referee's decision was most likely tainted. We have no reason to assume that the

arbitrator considered the effect of Article I, Section 7 of the Agreement on Peters's claim for protective benefits if the union did not point him to this provision. As such, the union's failure would have seriously flawed the arbitrator's decision."

This Court further held in Rilling vs. Burlington Northern R. Co., 909 F.2d 399, 401 & 402 (9th Cir. 1990):

"The validity of the release, therefore, should be determined in the first instance by the ICC. 'After the ICC has clarified [Rilling's] rights, a suit in federal court may be entirely proper.' The magistrate incorrectly concluded that the validity of the release was sufficiently removed from the rights granted under the ICC's merger order to preclude application of the doctrine of primary jurisdiction."

When the Interstate Commerce Commission granted the Frisco Merger it was represented by the Burlington Northern Railroad that large numbers of employees would be displaced because of the merger and that they would compensate all such employees, which they have failed to do. The Ninth Circuit Court of Appeals stated in Polich v. Burlington Northern, Inc., 942 F.2d 1467, 1473 (9th Cir.

1991):

"A railroad carrier may not merge with another carrier without the approval and authorization of the ICC. 49 U.S.C. Sec. 11343(a)(1)(1988); Kraus v. Santa Fe Southern Pacific Co., 878 F.2d 1193, 1197 (9th Cir. 1989); cert. dismissed, ---U.S.---, 110 S.Ct. 1329, 107 L.Ed.2d. 850 (1990). The Interstate Commerce Commission has exclusive jurisdiction over such mergers. 49 U.S.C. Sec. 11341(a)(1988). It is undisputed that the ICC approved both mergers at issue here."

The Burlington Northern Railroad has engaged in massive litigation since the time of the Frisco Merger on the false premise there is no causal nexus between the merger and the lay-offs. We respectfully submit the railroad is wrong and prior to the merger they agreed that if this transaction was approved the results contemplated would be compensated.

We respectfully submit that the Opinion of Joseph A. Sickles is clearly based on a false premise, is tainted and should be reviewed and an Order issued mandating him to determine the benefits and order them paid. We submit the

rule applicable is set forth in the Eighth Circuit Court of Appeals in Cosby v. ICC and Burlington Northern, Intervenor, 741 F.2d 1077 (8th Cir. 1984); and the ICC ruling in Cosby-ICC Opinion of Burlington No., Inc.-Cont. & Mer.-St.L.-San.Fran.Ry.Co., Docket No. 285283, 6 ICC2d 351 (Decided: January 18, 1990.)

CONCLUSION

The Petition for Rehearing was not filed by the Clerk of the Ninth Circuit Court of Appeals because of a technical mixup which is apparently the fault of said clerk, not this Petitioner. The mistake was compounded in the office of the Clerk of the District Court for the State of Montana, Billings Division.

We respectfully submit that this Court should over-rule the findings of the arbitrator, Joseph A. Sickles or mandate the Interstate Commerce Commission to review the

matter.

In the interest of justice, this Writ should be issued on one or both grounds set forth herein.

Respectfully submitted,

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BY S/Joseph P. Hennessey
Counsel for Petitioners

A P P E N D I X

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

LARRY E. COLLINS, JOHN K. GRAUBERGER, PHIL J. CHAPPLE, et al.,	)	
Plaintiffs,	)	CV 85-252-BLG-JFB
vs.	)	
BURLINGTON NORTHERN RAILROAD COMPANY,	)	ORDER
Defendant.	)	

Presently pending before this Court is plaintiffs' Motion to Reconsider this Court's Order of October 11, 1990 rejecting plaintiffs' motions (1) to lift a stay imposed in this case pending arbitration, (2) to

overturn the neutral arbitrator's ruling, and (3) to reconsider and reverse a prior order of dismissal in this case dated July 27, 1987. In so ruling, the Court determined that it retained jurisdiction in this case solely to "enforce the arbitration provisions imposed under 49 U.S.C. SEc. 11347 and New York Dock." See Order of October 11, 1990, at 1 (citing Collins v. Burlington Northern RR Co., No. 87-4141 (9th Cir. May 18, 1989) (denying defendant's petition for rehearing)). The Court concluded that because the arbitration proceeding had been completed, the Court no longer retained jurisdiction -- the arbitration provisions had been "enforced."

Consequently, the Court ordered dismissal of the case and denied plaintiffs' motions. The Court noted that an "arbitrator's award," pursuant to 49 U.S.C. Sec. 11347 and New York Dock, "is treated as an order of the

Interstate Commerce Commission. Such orders may be appealled [sic] only to the courts of appeals." Id., at 2 (citing 28 U.S.C. Sec. 2321(a), 2342; Brotherhood of Railway Carmen v. CSX Transportation, Inc., 855 F.2d 745, 748-49 (11th Cir. 1988), cert. denied, 109 S.Ct. 1130 (1989); United Transportation Union v. Norfolk & Western Railroad Co., 822 F.2d 1114, 1120 (D.C. Cir. 1987), cert. denied, 484 U.S. 1006 (1988)). Plaintiffs now challenge the Court's prior Order because it relied in part on the United Transportation Union case.

Courts have distilled three major grounds for justifying reconsideration of prior orders: "(1) an intervening change in controlling law; (2) the availability of new evidence or an expanded factual record; and (3) need to correct a clear error or prevent manifest injustice." Kern-Tulare Water Dist. v. City of Bakersfield,k 634 F.Supp. 656, 665

(E.D.Cal. 1986); see also Boone v. United States, 743 F.Supp. 1367 (D.Hawaii 1990). A motion for reconsideration that presents no new arguments should be denied. Backlund v. Barnhart, 778 F.2d 1386 (9th Cir. 1985). In the present case, plaintiffs seek reconsideration to prevent this Court from erroneously relying on the United Transportation Union case. Plaintiffs maintain that the Ninth Circuit Court had considered this case in prior proceedings and had rejected its holdings.

Even assuming that plaintiffs' contentions are correct and that the Ninth Circuit Court did reject the holding of United Transportation Union, the Court finds that this does not justify granting plaintiffs' motion for Reconsideration. First, the Ninth Circuit Court's rejection of the case, if any, applies only to the issues then pending before

the Appellate Court: whether the District Court had jurisdiction "to enforce the arbitration provisions imposed under 49 U.S.C. Sec. 11347 and New York Dock" and whether to impose a stay of the case pending arbitration. These issues are separate and distinct from the matters decided by this Court in its Order of October 11, 1990. The matters considered in this Court's prior Order focused on whether this Court had jurisdiction to lift its stay, to review a neutral arbitrator's award, and to rescind its prior order of dismissal. As such, any disapproval of the United Transportation Union decision expressed by the Ninth Circuit Court has no application to the questions decided by this Court.

Secondly, plaintiffs have not refuted, or shown in any manner, that this Court's reliance on other authorities cited is clearly erroneous. As such, the Court will not alter

its conclusion that an "arbitrator's award", made pursuant to 49 U.S.C. Sec. 11347 and New York Dock, "is treated as an order of the Interstate Commerce Commission. Such orders may be appealed only to the Courts of Appeals." If plaintiffs wish to challenge this conclusion further, they are certainly entitled to appeal to the Ninth Circuit Court of Appeals.

Accordingly,

IT IS ORDERED that plaintiffs' Motion to Reconsider be and hereby is denied.

The Clerk is directed forthwith to notify counsel for the respective parties of the making of this order.

Done and Dated this 14th day of December, 1990.

James F. Battin
Senior U.S. District Judge

Filed: December 14, 1990
Lou Aleksich, Jr. Clerk

################

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

LARRY E. COLLINS, JOHN K. GRAUBERGER, PHIL J. CHAPPLE, et al.,	)	
Plaintiffs,	)	No. CV-85-252-BLG
vs.	)	
BURLINGTON NORTHERN RAILROAD COMPANY,	)	NOTICE OF APPEAL and PETITION FOR REVIEW
Defendant.	)	

NOTICE IS HEREBY given that Plaintiffs LARRY E. COLLINS, JOHN K. GRAUBERGER, PHIL J. CHAPPLE, et al., hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order of October 11, 1990 denying Plaintiffs' motions to (1) lift the stay of this action that was imposed pending arbitration (2) to overturn the neutral arbitrator's ruling and (3) to reconsider and

reserve a prior order of dismissal in this case and said Order dismisses the case with prejudice and December 14, 1990 Order which denies Plaintiffs' motion to reconsider the Order of October 10, 1990 by the Honorable James F. Battin; and

The Plaintiffs also petition the United States Court of Appeals for the Ninth Circuit to review the arbitration decision of July 10, 1990 which denied Claimants (Plaintiffs) benefits under the New York Dock Labor Protective Provisions and letter of July 30, 1990 by Joseph A. Sickles, which re-affirms his ruling dated July 10, 1990.

DATED this 11th day of January, 1991.

HENNESSEY LAW OFFICE

BY Joseph P. Hennessey

Filed: January 11, 1991
Lou Alekisch, Jr., Clerk

##########

JUDGMENT Jan 30 1992 MANDATE ISSUED

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

No. 91-35163
CT/AG#: CV-85-0252-BLG

FILED
FEB 3 1992
LOU ALEKSICH JR. Clerk
By Sandra L. Studiner
Deputy Clerk

LARRY E. COLLINS; JOHN K. GRAUBERGER; PHIL J. CHAPPLE
Plaintiffs - Appellants

v.

BURLINGTON NORTHERN RAILROAD COMPANY
Defendant - Appellee

APPEAL FROM the United States District Court for the District of Montana (Billings) .

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Montana (Billings) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ judgment of the District Court in

this case be, and hereby is affirmed.

Filed and entered: December 20, 1991

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST
JAN 30 1992
by: J.L. Crocker
Deputy Clerk

#########

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
DEC 20 1991
Cathy A. Catterson,Clerk
U.S. Court of Appeals

LARRY E. COLLINS; JOHN K. GRAUBERGER; PHIL J. CHAPPLE	) No. 91-35163
Plaintiffs-Appellants,	) D.C. No.CV-85--252-BLG
v.	) MEMORANDUM*
BURLINGTON NORTHERN RAILROAD COMPANY,	) FILED FEB 3 1992
Defendant-Appellee.	) LOU ALEKSICH JR CLERK By Deputy Clerk

Appeal from the United States District Court
for the District of Montana

James F. Battin, Chief District Judge, Presiding

Submitted December 4, 1991**
Seattle, Washington

Before: WRIGHT, THOMPSON and T.G. NELSON, Circuit Judges.

Collins and others, all former employees of Burlington Northern ("BN"), appeal the district court's dismissal for lack of subject matter jurisdiction. Their action challenged the outcome of a completed arbitration proceeding in which the arbitrator denied their claim of benefits. The appellants had claimed benefits due to the adverse economic consequences they allegedly suffered as a result of the merger between BN and the St. Louis/San Francisco Railway ("Frisco merger").

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unaminously finds this case

suitable for decision without oral argument. Fed.R.App.P. 34(a) and Ninth Circuit Rule 34-4.

FACTS AND PRIOR PROCEEDINGS

This case has been before the federal courts for seven years. In its first appearance in this court, the panel in Collins v. Burlington Northern Railroad Co., 867 F.2d 542, 544 (9th Cir. 1987), held that pursuant to 49 U.S.C. Sec. 11347, arbitrations of disputes arising from conditions imposed by the Interstate Commerce Commission were mandatory. The court remanded the case to the district court, however, to determine whether a stay should have been entered and an order compelling arbitration granted. The district court lacked jurisdiction, however, to "entertain unexhausted substantive claims." Id. at 545.

An arbitration committee was formed although the district court retained jurisdiction for the sole purpose of

enforcing the arbitration provisions imposed under Sec. 11347 and New York Dock Railway-Control-Brooklyn Eastern District Terminal, 360 I.C.C. 60, aff'd, 609 F.2d 83 (2d Cir. 1979). The committee determined that "while there has clearly been a loss of employment in Laurel, Montana, there has been absolutely no showing that the Frisco merger even remotely caused or led to any of the loss of employment or adverse positioning." The district court considered the matter closed in favor of the defendants. "Upon termination of the arbitration proceedings, this court no longer retains jurisdiction -- nothing is left for this court to 'enforce.'"

The district court dismissed the appellants' argument that it had the power to set aside the arbitrator's award. "Plaintiffs ignore the plain import of the statutory and case law in asserting this position. An

arbitrator's award is treated as an order of the Interstate Commerce Commission. Such order may be appealed only to the court of appeals." See 28 U.S.C. Secs. 2321(a), 2342; Brotherhood of Railway Carmen v. CSX Transportation, Inc., 855 F.2d 745, 748-749 (11th Cir. 1988), cert. denied, 489 U.S. 1016 (1989).

ANALYSIS

The district court clearly did not have the jurisdiction to review the decision of the arbitration committee. "Congress conferred exclusive jurisdiction on the court of appeals 'to enjoin, set aside, suspend (in whole or in part), or to determine the validity of...(5) all rules, regulations and final orders of the Interstate Commerce Commission...'" United Transportation Commission v. Norfolk and Western Railway Co., 822 F.2d 1114, 1120 (D.C. Cir. 1987), cert. denied, 484 U.S. 1006 (1988)

(citing 28 U.S.C. Sec. 2343). "Since 1975, ICC orders have been subject to direct review in the court of appeals." Owner-Operators Independent Drivers Ass'n v. Skinner, 931 F.2d 582, 586 (9th Cir. 1991). Since arbitration is mandatory as imposed by the I.C.C., the arbitrator's decision is a final order. We hold that the district court correctly determined that it lacked jurisdiction to hear this case.

AFFIRMED.

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST
JAN 30 1992
by: J.L. Crocker
Deputy Clerk

IN THE UNITED STATES

COURT OF APPEALS

FOR THE NINTH CIRCUIT

LARRY E. COLLINS, JOHN K. GRAUBERGER, PHIL J. CHAPPLE, et al.,	)	
Plaintiffs-Appellants,	)	
vs.	)	No. 91-35163
BURLINGTON NORTHERN RAILROAD COMPANY,	)	
Defendant-Respondent.	)	

PETITION FOR REHEARING

INTRODUCTION

Plaintiff-Appellant respectfully petitions for rehearing on that portion of the Court's Opinion refusing to review the findings of arbitrator, Joseph A. Sickles. It is the judgment of counsel that if under all the proceedings in this case, the Court determined that there was no power of review in the

District Court of the arbitrator findings, then the second part of Plaintiff's appeal asking for review should have been considered. Appellant's Reply Brief states in part:

"The Defendant-Respondent's Brief in its entirety is based upon a false premises. As they stated in their brief:

'Where arbitration is mandated by an ICC Order, as it was here, then the arbitration decision is regarded as an order of the ICC and may be appealed only to the ICC and to the Court of Appeals. I.B.E.W. v. I.C.C., 862 F.2d 330 (D.C. Cir. 1988); United Transportation Union, 822 F.2d at 1120, cert denied 484 U.S. 1006 (1988); Carmen v. CSX Transportation, Inc., 855 F.2d 745 (11th Cir. 1988), cert. denied 109 S.Ct. 1130. In the latter two cases, the Court of Appeals held that the District Court could not review an arbitrator's decision where arbitration was mandated by an ICC Order.' [Respondent's Brief, page 9 and 10].

As this entire record shows this case has never been before the agency to-wit: The Interstate Commerce Commission. Before the briefing of this appeal, the Clerk of the United States Court of Appeals for the Ninth Circuit called us by phone, stating that a review of the record shows the case has never been in the agency, and a review might not be in order.

We will furnish the Court with a transcript of the proceedings before the arbitration committee upon request of the Court."

ARGUMENT

IF THE DISTRICT COURT HAS NO JURISDICTION TO REVIEW THE FINDINGS OF AN ARBITRATOR UNDER THE FACTS OF THIS CASE, THEN APPELLANT IS ENTITLED TO A REVIEW BY YOUR HONORABLE COURT.

We have a conflict in this case. If in fact this case is deemed to be under the holding in United Transportation Commission v. Norfolk and Western Railway Co., 822 F.2d 1114, (D.C. Cir. 1987), cert. denied, 484 U.S. 1006 (1988) (citing 28 U.S.C. Sec. 2342). "Since 1975, ICC orders have been subject to direct review in the court of appeals." Owner-Operators Independent Drivers Ass'n v. Skinner, 931 F.2d 586 (9th Cir. 1991), then under the Petition for Review filed by Appellant on January 11, 1991, this Court should review the findings of the arbitrator, Joseph A. Sickles.

The holding in the case of Employees of

the Butte, Anaconda & Pacific v. U.S., 938 F.2d 1009 (9th Cir. 1991) is not applicable to the record in this case. It is an appeal from a ruling of the Interstate Commerce Commission sustaining the arbitrator, Joseph A. Sickles in an order over-ruling the findings of a previous arbitrator Cassle.

This Court held in Peters v. Burlington Northern R. Co., 931 F.2d 534, 541 & 542 (9th Cir. 1990):

"Burlington Northern argues that the district court lacks authority to exercise jurisdiction over Peters's claims against it, asserting that under the Railway Labor Act these claims may only be handled through arbitration. However, if an employee alleges inadeqaute union representation, a district court can in some circumstances exercise jurisdiction over the employee's claim agains his employer. See Glover v. St. Louis-San Francisco Railway, 393 U.S. 324, 329-30, 89 S. Ct. 548, 551, 21 L.Ed.2d 519 (1969)...
...Ninth Circuit authority supports the view that in this case Glover is applicable.
...In the instant case, if the union indeed breached its duty of fair representation, the referee's decision was most likely tainted. We have no reason to assume that the arbitrator considered the effect of Article I,

Section 7 of the Agreement on Peters's claim for protective benefits if the union did not point him to this provision. As such, the union's failure would have seriously flawed the arbitrator's decision."

This Court further held in Rilling v. Burlington Northern R. Co., 909 F.2d 399, 401 & 402 (9th Cir. 1990):

"The validity of the release, therefore, should be determined in the first instance by the ICC. 'After the ICC has clarified [Rilling's] rights, a suit in federal court may be entirely proper.'

The magistrate incorrectly concluded that the validity of the release was sufficiently removed from the rights granted under the ICC's merger order to preclude application of the doctrine of primary jurisdiction."

When the Interstate Commerce Commission granted the Frisco Merger it was represented by the Burlington Northern Railroad that large numbers of employees would be displaced because of the merger and that they would compensate all such employees, which they have failed to do. This Court stated in Polich v. Burlington Northern, Inc., 942 F.2d 1467, 1473 (9th Cir. 1991):

"A railroad carrier may not merge with another carrier without the approval and authorization of the ICC. 49 U.S.C. Sec. 11343(a)(1)(1988); Kraus v. Santa Fe Southern Pacific Co., 878 F.2d 1193, 1197 (9th Cir. 1989); cert. dismissed, ---U.S.---, 110 S.Ct. 1329, 107 L.Ed.2d. 850 (1990). The Interstate Commerce Commission has exclusive jurisdiction over such mergers. 49 U.S.C. Sec. 11341(a)(1988). It is undisputed that the ICC approved both mergers at issue here."

The Burlington Northern Railroad has engaged in massive litigation since the time of the Frisco Merger on the false premise there is no causal nexus between the merger and the lay-offs. We respectfully submit the railroad is wrong and prior to the merger they agreed that if this transaction was approved the results contemplated would be compensated. We respectfully submit that the Opinion of Joseph A. Sickles is clearly based on a false premise, is tainted and should be reviewed and an Order issued mandating him to determine the benefits and order them paid. We submit the rule applicable is set forth in the Eighth

Circuit Court of Appeals in Cosby v. ICC and Burlington Northern, Intervenor, 741 F.2d 1077 (8th Cir. 1984); and the ICC ruling in Cosby-ICC Opinion of Burlington No., Inc.-Cont. & Mer.-St. L.-San Fran. Ry. Co., Docket No. 285283, 6 ICC2d 351 (Decided: January 18, 1990).

CONCLUSION

The Plaintiff-Appellant is cognizant of the fact that none of the Interstate Commerce Commissioners have made an input on these legal determinations which involve the administration of the Interstate Commerce Act and prior Interstate Commerce Commission decisions.

We respectfully submit that this Court should over-rule the findings of the arbitrator, Joseph A. Sickles or mandate the Interstate Commerce Commission to review the matter.

Respectfully submitted this 15th day of February, 1992.

S/Joseph P. Hennessey

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

P.O. BOX 547
SAN FRANCISCO, CALIFORNIA 94104

DATE: 2-18-92

MEMORANDUM

TO: JOSEPH HENNESSEY

FROM: JEFFREY CROCKER, DEPUTY CLERK

SUBJECT: Defective Petition for Rehearing
CA No. 91-35163 COLLINS v. BURLINGTON

A petition for rehearing in the referenced case was received on 2-18-92 and could not be filed for the following reason(s):

[✓] The petition was received late. A motion for leave to file it late must be submitted.

[✓] The petition was received late and the mandate has issued. A motion to recall the mandate must be submitted..

[✓] An insufficient number of copies of the petition were received. Please submit an additional 15 copies immediately and the petition will be filed.

E PUT YOUR CURRENT PHONE # ON ALL
ER CORRESPONDENCE WITH THIS COURT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LARRY E. COLLINS; JOHN K. GRAUBERGER, PHIL J. CHAPPLE, et al.,	)	
Plaintiffs-Appellants,	)	No. 91-35163
vs.	)	CT/AG#:CV-85-252-BLG
BURLINGTON NORTHERN RAILROAD COMPANY,	)	MOTION TO RECALL MANDATE AND FOR LEAVE TO FILE PETITION FOR REHEARING
Defendant-Appellee.	)	

COMES NOW the Appellants, LARRY E. COLLINS, et al., and moves the Court for an Order recalling the Mandate that has been previously issued in this matter.

Comes now the Appellants and moves the Court for an Order allowing the Appellants to file their Petition for Rehearing received by the Clerk of Court on February 18, 1992.

This motion is based upon the Affidavit of Joseph P. Hennessey hereto attached and by

reference made a party hereof.

Dated this 22nd day of February, 1992.

S/Joseph P. Hennessey

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LARRY E. COLLINS; JOHN K. GRAUBERGER; PHIL J. CHAPPLE,	NO. 91-35163
Plaintiffs-Appellants,	D.C. No. CV-85-0252-BLG
vs.	ORDER
BURLINGTON NORTHERN RAILROAD COMPANY,	
Defendant-Appellee.	

Before: T.G. NELSON, Circuit Judge.

Appellants' "Motion to Recall Mandate and for Leave to File Petition for Rehearing" filed February 24, 1992, is DENIED.

Filed: March 4, 1992
Cathy A. Catterson, Clerk
U.S. Court of Appeals

EXHIBIT B

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Larry E. COLLINS; John K. Grauberger; Phil J. Chapple,
Plaintiffs-Appellants,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Defendant-Appellee.

No. 87-4141.

United States Court of Appeals,
Ninth Circuit

Argued and Submitted Oct. 6, 1988.

Decided Feb. 2, 1989.

Former railroad employees brought action to recover benefits under conditions imposed by the Interstate Commerce Commission when approving railroad merger. The United States District Court for the District of Montana, James F. Battin, Chief Judge, dismissed the action for lack of jurisdiction due to failure

to exhaust administrative remedies. Former employees appealed. The Court of Appeals held that: (1) arbitration was mandatory for disputes arising under the conditions; (2) former employees failed to exhaust their mandatory administrative remedies; and (3) remand was necessary for determination of whether stay should be entered and order compelling arbitration granted.

Affirmed and remanded.

1. Arbitration-Key #4.1

Arbitration of disputes arising out of conditions imposed by the Interstate Commerce Commission when approving railroad merger was mandatory. 49 U.S.C.A. Sec. 11347.

2. Carriers-Key #201

Fact that union refused to pursue claim, which concerned conditions imposed by the Interstate Commerce Commission when approving railroad merger, to arbitration did not

preclude determination that former railroad employees failed to exhaust mandatory administrative remedies; former employees could have proceeded to arbitration without union representation.

3. Federal Courts-Key #930

Remand was necessary for determination of whether stay should be entered and order compelling arbitration granted, in action arising out of conditions imposed by the Interstate Commerce Commission when approving railroad merger, although district court lacked jurisdiction to entertain the unexhausted substantive claims, in appropriate circumstances, court would have jurisdiction to compel arbitration. 9 U.S.C.A. Sec. 3.

Joseph P. Hennessey, Hennessey Law Office, Billings, Mont., for plaintiffs-appellants.

K. Kent Koolen and T. Thomas Singer,

Moulton, Bellington, Longo & Mather, P.C., Billings, Mont., for defendant-appellee.

Appeal from the United States District Court for the District of Montana.

Before FLETCHER, BOOCHEVER and TROTT, Circuit Judges.

PER CURIAM:

Plaintiffs appeal the district court's order dismissing their case for lack of jurisdiction due to failure to exhaust administrative remedies. We have jurisdiction to hear this appeal under 28 U.S.C. Sec. 1291, and we affirm.

In 1980, Burlington Northern Railroad Company (BN) merged with the St. Louise-San Francisco Railway. Thise merger, commonly referred to as the "Frisco Merger," was approved by the Interstate Commerce Commission (ICC) pursuant to 49 U.S.C. Sec. 11347.[1] In approving this merger, the ICC imposed certain

employee protective benefits, commonly known as the "New York Dock" conditions, see New York Dock Railway-Control-Brooklyn Eastern District Terminal, 360 I.C.C. 60, affirmed 609 F.2d 83 (2nd Cir. 1979), for those affected by the merger who had not entered into a protective agreement with Bn prior to its consummation. In effect, these protective benefits cushion the economic consequences to employees of layoffs caused by the consolidation of railroads.

Plaintiffs are former employees of BN who, beginning in 1982, were furloughed from their jobs as carmen at BN's car repair facility in Laurel, Montana. As members of the Brotherhood of Railway Carmen, which did not enter into a separate merger agreement for employee protections prior to the Frisco Merger, plaintiffs directed requests for New York Dock benefits to their union after being

furloughed. The requests were denied on the ground that the layoffs were not caused by the Frisco Merger, and the union declined to intercede on plaintiffs' behalf. Plaintiffs then made the same request of BN, but for some reason plaintiffs did not take this step until almost three years had gone by after they were turned down by their union. In their request to BN, plaintiffs also mentioned a willingess to arbitrate. The plaintiffs made no other attempt to initiate arbitration.

In essence, BN gave plaintiffs the cold shoulder, and plaintiffs proceeded directly to court with this lawsuit. Plaintiffs claim that they bypassed arbitration because BN's refusal to acknowledge their tardy communication made arbitration futile.

In this lawsuit, plaintiffs continue to claim their furloughs were caused by the Frisco Merger which, if true, would make them

eligible for benefits. BN, however, disputes this allegation, claiming the furloughs were an economic necessity, caused by a decline in business-not the Frisco Merger-and therefor plaintiffs are not eligible for the benefits they seek.

Article I, Section 11(a) of the New York Dock conditions provides:

> In the event the railroad or its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix...within 20 days after the dispute arises it may be referred by either party to an arbitration committee. On notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 20 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman...

(Emphasis added).

[1] The fundamental issue in this case created by the dispute over the cause of the furloughs is whether arbitration is mandatory

or permissive under this section, an issue of first impression in this circuit. If Article I, Section 11(a) is a mandatory provision, then employees asserting contract grievances and seeking New York Dock benefits must pursue resolution through the arbitration process prior to bringing a federal court action.

The district court determined that Section 11(a) imposes mandatory arbitration of disputes, relying on the reasoning of the Eighth Circuit in Hoffman v. Missouri Pacific R.R., 806 F.2d 800, 801 (8th Cir. 1986), and the Seventh Circuit in Walsh v. United States, 723 F.2d 570, 573-574 (7th Cir. 1983). The resolution of this issue on appeal depends upon the interpretation of the language "may be referred by either party to an arbitration committee" contained in Sec. 11(a).

In Walsh v. United States, 723 F.2d 570 (7th Cir. 1983), the court looked to the

intent of the ICC-the drafter of this provision-in its use of the word "may" which in ordinary usage is permissive rather than mandatory. The court noted that Sec. 11 was traceable to an identical clause of the "Oklahoma conditions". In referring to the Oklahoma condition, the ICC stated: "In our opinion, fairness and equity require adoption...of the condition...with respect to arbitration, which will make mandatory the submission to binding arbitration of disputes not settled by agreement between the carrier and employee." Walsh, 723 F.2d at 574 (quoting Southern Ry. co.-Control-Central of Georgia Ry. Co., 317 I.C.C. 557, 566 (1962)(emphasis added)). The Seventh Circuit concluded that these comments make it "evident that the ICC intended [Sec. 11(a)] to connote mandatory arbitration." Id.

The Eighth Circuit expressly followed

Walsh in Hoffman v. Missouri Pacific R.R., 806 F.2d 800 (8th Cir. 1986). In adopting the "well-reasoned" decision of Walsh, the court rejected as misplaced plaintiff's reliance on Nemitz v. Norfolk & Western Ry., 436 F.2d 841 (6th Cir.), aff'd 404 U.S. 37, 92 S.Ct. 185, 30 L.Ed.2d 198 (1971). Nemitz involved an arbitration clause which contained language very similar to Sec. 11(a) providing that any dispute or controversy arising between the employer and union "may be referred by either party to an arbitration committee for consideration and determination." 436 F.2d at 843 n. 1. The Nemitz court concluded that arbitration was mandatory only to the extent that if one party requested arbitration, the other party was required to arbitrate. Arbitration would remain permissive if neither party invoked arbitration. Id. at 849. In Hoffman, however, the court concluded Nemitz

was distinguishable because "Nemitz did not involve the New York Dock conditions, and in affirming the Sixth Circuit decision, the Supreme Court did not discuss the arbitration clause that was before the circuit court." 806 F.2d at 801. The court in Hoffman believed its holding to be in line with the strong federal policy favoring arbitration of labor disputes. See International Ass'n of Heat & Frost Insulators, Local Union 34 v. General Pipe Covering, Inc., 792 F.2d 96, 100 (8th Cir. 1986).

The Hoffman court then turned to plaintiff's argument that she was excused from arbitration because her union refused to arbitrate on her behalf. The court found this argument ignored the clear language of Sec. 11(a): "[I]f the railroad and its employees or their authorized representatives cannot settle any dispute...[over]t the interpretation,

application or enforcement of [the condition]...,it may be referred by either party to an arbitration committee." Hoffman, 806 F.2d at 801 (quoting New York Dock Ry., 360 I.C.C. at 87) (Emphasis supplied). The court determined "[u]nder this language, an employee can proceed to arbitration without union representation, and the union fully informed [plaintiff] of her ability to proceed in this matter." Id.

The Sixth Circuit determined that arbitration under Sec. 11(a) is mandatory rather than permissive in Atkins v. Louisville & Nashville R.R., 819 F.2d 644 (6th Cir. 1987). In reaching this conclusion the court noted that every federal court which has interpreted Sec. 11(a) has decided that arbitration is mandatory. 819 F.2d at 647-48. The court relied upon the reasoning of both the Seventh and Eighth Circuits in Walsh and

Hoffman and further noted that multiple district courts have interpreted Sec. 11(a) in this manner. See, e.g. Atkinson v. Union Pac. R.R., 628 F.Supp. 1117, 1119-20 (D.Kan.1985); Bond v. Union Pac. R.R., 601 F.Supp. 329, 331-32 (D.Neb.1984); McKeon v. Toldeo P. & W. R.R., 595 F.Supp. 766, 768-70 (C.D.Ill.1984); Swartz v. Norfolk & Western Ry., 589 F.Supp. 743, 746-46 (E.D.Mo.1984).

The Atkins court also addressed the issue of whether the obligation to pursue arbitration is satisfied when plaintiffs seek to have their union invoke arbitration but the union refused. The court, as did the court in Hoffman, concluded that a union's refusal to invoke the arbitration remedy will not alone constitute exhaustion or indicate the futility of further attempts to invoke arbitration because the employee can proceed under Sec. 11(1) without union representation. 819 F.2d

at 650.

We find the reasoning of our fellow circuits persuasive and join in thier conclusion that arbitration pursuant to New York Dock is mandatory.

[2] The district court found that plaintiffs failed to pursue their administrative remedies. The record amply supports this finding. As stated by the district court, the circumstances of this case not unlike those discussed in Hoffman. It does not matter that the union refused to pursue the claim, because plaintiffs may proceed to arbitration without union representation. Hoffman, 806 F.2d at 801. Furthermore, this was acknowledged implicitly by plaintiffs in their demand letter.[2] Even though BN did not respond to the letter, this lack of response falls short of showing futility of exhaustion. Because plaintiffs

have taken no further affirmative steps to refer the matter to an arbitration committee, plaintiffs have failed to exhaust their mandatory administrative remedies; and the district court correctly determined it lacked jurisdiction to decide plaintiffs' substantive claims. Wren v. Sletten Construction Co., 654 F.2d 529, 535 (9th Cir. 1981). The court's decision on this issue is affirmed.

[3] On appeal, plaintiffs contend that if arbitration is mandatory, the district court should have entered a stay and ordered the parties to arbitrate under 9 U.S.C. Sec. 3.[3] In their response brief to the district court, plaintiffs requested:

> Should the court determine nonetheless that arbitration is mandatory and has not been exhausted, then it should order BN to arbitration, given its history of intractability, and stay the instant proceedings pending the outcome of the arbitration. 9 U.S.C. Sec. 3.

The district court failed to consider

whether a stay is appropriate under the circumstances of this case. Accordingly, we remand to the district court for a determination of whether a stay should be entered and an order compelling the parties to arbitration granted.

Although the district court lacks jurisdiction to entertain the plaintiffs' unexhausted substantive claims, in appropriate circumstances, the court does not jurisdiction to compel arbitration. See, e.g. New Orleans and Northeastern R.R. v. Bozeman, 312 F.2d 264 (5th Cir. 1963) (upholding district court order compelling arbitration under the "Oklahoma conditions") Burlington Northern Inc. v. American Ry. Supervisors Ass'n., 503 F.2d 58 (7th Cir. 1974) ("when an agreement to arbitrate is one of the protections afforded employees under Section 5(2)(f) of the Interstate Commerce Act, the obligation to

arbitrate will be enforced by the courts"), cert. denied, 421 U.S. 975, 95 S.Ct. 1974, 44 L.Ed.2d 466 (1975).

The district court's decision that the New York Dock conditions require mandatory arbitration and that plaintiffs failed to exhaust this administrative remedy, is AFFIRMED. We REMAND the case to the district court, however, for a determination of whether a stay should have been entered and the parties compelled to arbitration.

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1. 49 U.S.C. Sec. 11347 provides in pertinent part: When a rail carrier is involved in a transaction for which approval is sought...the Interstate Commerce Commission shall require the carrier to provide a fair arrangements at least as protective of the interests of employees who are affected by the transaction as the terms imosed under this section... The arrangement and the order approving the transaction must require that the employees of the affected rail will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission....

2. In this demand letter, dated February 28, 1985, plaintiffs notified BN that it was their belief that the New York Dock conditions had not been met by BN. They stated: "We are willing to go to arbitration in this matter. If we do not hear within 30 days (sic), we will authorize any action necessary to force compliance with the 'Frisco Merger.'"

3. 9 U.S.C. Sec. 3 provides:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

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Ronald L. COSBY, et al., Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and United States of America, Respondents.

Burlington Northern Railraod Company, Intervenor.

No. 84-1110

United States Court of Appeals
Eighth Circuit.

Submitted June 15, 1984.

Decided Aug. 22, 1984.

Rehearing and Rehearing En Banc
Denied Oct. 18, 1984.

Terminated employees of motor carrier subsidiary of railroad sought review of decision of the Interstate Commerce Commission which denied them layoff benefits in accordance with employee protective conditions contained in order approving merger of railroads. The Court of Appeals, Heaney, Circuit Judge, held that: (1) plaintiff employees were "affected by" the merger transaction for purposes of entitlement to layoff benefits where merger made it possible for surviving railroad to phase out the motor carrier employer to make room for its other motor carrier subsidiary; (2) for purposes of

entitlement to benefits, employees of motor carrier subsidiary were also employees of railroad participating in the merger, (3) the motor carrier employees were "railroad employees" within meaning of provision of the Revised Interstate Commerce Act relating to employee protective arrangements where motor carrier's operations were generally restricted to service which was auxiliary to or supplementary of rail service of a railroad participating in the merger, and (4) even if the Commission had discretion to grant or deny protective conditions to employees of motor carriers operating at the time of merger, it was an abuse of discretion not to grant motor carrier employees the same protective conditions granted to other railraod employees of railroad participating in the merger, in light of representations made by the railroads at the time of merger that such employees

would not be affected.

Reversed and remanded.

1. Commerce-Key #85.7

Provision of the Revised Interstate Commerce Act with respect to employee protective arrangements in connection with consolidation of rail carriers applies to those who are employees of one of the railroads participating in the merger and who are affected by the transaction, and generally does not cover employees of other railroads which might be affected by the merger. Revised Interstate Commerce Act, 49 U.S.C.A. Sec. 11347.

2. Commerce-Key #85.7

Employees of motor carrier subsidiary of railroad involved in merger were "affected by the transaction" for purposes of being entitled to layoff benefits under employee protective conditions contained in order

approving merger where, as result of the merger, suriving railroad was able to phase out the motor carrier in question to make room for its other motor carrier subsidiary. Revised Interstate Commerce Act, 49 U.S.C.A. Sec. 11347.

3. Commerce-Key #85.7

Employees of subsidiary of railroad participating in merger were considered employees of participant in the merger for purposes of entitlement to layoff benefits in accordance with employee protective conditions contained in order approving the merger. Revised Interstate Commerce Act, 49 U.S.C.A. Sec. 11347.

4. Commerce-Key #85.7

Employees of motor carrier subsidiary of railroad were "railroad employees" within meaning of section of Revised Interstate Commerce Act providing for employee protective

arrangements in connection with consolidation of rail carriers, where the motor carrier's operations were generally restricted to service which was auxiliary to supplemental of rail service of one of the participants in the merger, and thus was part of one of the merging railraod's overall transportation system, and there was no evidence that the skills of its employees were transferable to general motor carrier services. Revised Interstate Commerce Act, 49 U.S.C.A. Secs. 11344(b), 11347.

See publication Words and Phrases for other judicial constructions and definitions.

5. Commerce-Key #85.7

Even if the Interstate Commerce Commission had discretion to grant or dney protective conditions to employees of subsidiary motor carriers operating at time of railroad merger, it was an abuse of discretion not to grant to

motor carrier employees the same protective conditions granted to merging rail carrier's other railroad employees, in light of representation made by the railroads at the time of the merger that operations of the motor carrier subsidiary would continue in the same manner and no employee would face involuntary unemployment. Revised Interstate Commerce Act, 49 U.S.C.A. Sec. 11347.

6. Commerce-Key #85.7

Employees of motor carrier subsidiary of one of two railraods involved in merger did not waive right to receive benefits of employee protective conditions of order approving merger by not intervening, since they had right to rely on representations that were made by officers of the two railroads that they would not be affected. Revised Interstate Commerce Act, 49 U.S.C.A. Sec. 11347.

Frank W. Taylor, Alex M. Lewandowski, Ruth E. Bandoli, Kansas City, Mo., for petitioners; Griffin, Dysart, Taylor, Penner & Lay, P.C., Kansas City, Mo., of counsel.

Donald E. Engle, Nicholas P. Moros, William R. Power, St. Paul, Minn., Attys. for intervenor, Burlington Northern R. Co.

J. Paul McGrath, Asst. Atty. Gen., Barry Grossman, Frederic Freilicher, Attys., Dept. of Justice, Washington, D.C., John Broadley, Gen. Counsel, Lawrence H. Richmond, Deputy Associate Gen. Counsel, John J. McCarthy, Jr., Atty., I.C.C., Washington, D.C., for respondents.

Before HEANEY and FAGG, Circuit Judges, and COLLINSON*, Senior District Judge.

HEANEY, Circuit Judge.

Ronald L. Cosby and more than one hundred other terminated employees of the Frisco

Transporation Company (FTC), a subsidiary of the St. Louis-San Fransico Railway Comopany (Frisco), requests this Court to review a decision of the Interstate Commerce Commission which denied them layoffs benefits in accordance with employee protective conditions contained in a 1980 order approving the merger of the Burlington Northern (BN) and Frisco. 360 I.C.C. 788 (1980), aff'd sub nom., Missouri-Kansas-Texas Railroad v. United States, 632 F.2d 392 (5th Cir. 1980), cert. denied, 451 U.S. 1017, 101 S.Ct. 3005, 69 L.Ed.2d 388 (1981). We hold that the petitioners are entitled to receive benefits in accordance with the protective conditions contained in the 1980 order. We remand to the Commission for a computation of benefits.

The reasons for our decision are as follows:

(1) The FTC employees are entitled to

protective conditions under 49 U.S.C. Sec. 11347 (1984). That section requires the Commission "to provide a fair arrangement* * * protective of the interest of employees who are affected by the transaction* * *"[1]

The history of protective provisions for employees of merging or consolidating rail carriers is recounted in New York Dock Railway v. United States, 609 F.2d 83, 86-90 (2nd Cir. 1979). In 1933, congress enacted the Emergency Railroad Transportation Act which mandated a job freeze to guarantee the continued employment of employees of consolidating railroads. Because of the extreme effect this approach could have on operational efficiency, railroads and labor organizations agreed to a job security arrangement that provided bargaining and compensation protection to employes, but allowed the railroads to reduce their work force. That agreement was the Washington Job Protection Agreement of 1936 (WJPA). In 1940, Congress amended the Interstate Commerce Act

to include, inter alia, a labor protective provision modeled on the WJPA, 49 U.S.C. Sec. 5(2)(f). That section was extensively revised in 1978 and recodified at 49 U.S.C. Sec. 11347.

[1,2] On its face, section 11347 applies to those who are (1) employees of one of the railroads participating in the merger,[2] and (2) affected by the transaction. There is no doubt that the FTC employees were affected. i.e., "touched significantly," by the BN-Frisco merger. See Railway Labor Executives' Assoc. v. United States, 216 F.Supp. 101, 102 (E.D.Va. 1963). After the merger, BN had two motor carriers operating under auxiliary-to-rail restrictions. Both companies serviced its rail business. After the deregulation of the carrier industries, BN had several options with respect to its motor carrier subsidiaries. It chose to expand the

certificated authority of one of its motor carrier subsidiaries at the expense of the other. It expanded BN Transport's authority and FTC, still burdened by its traditional rail related restrictions, was unable to effectively compete. If FTC had not been made a subsidiary of BN as a result of the merger, BN could not have phased out FTC to make room for its other motor carrier subsidiary. Thus, FTC employees are clearly employees affected by the transaction.

[3] THey were also employees of Frisco, a participant in the merger. The Commission has "long considered that a carrier and its subsidiaries constitute a single transportation system with respect to transactions under section 5 of the Act." Pennsylvania Railroad Company-Merger-New York Central Railroad, 347 I.C.C. 536, 546 (1974)(citing Louisville & J.B. & R. Co.

Merger, 290 I.C.C. 725, 733; 295 I.C.C. 11; Wood Industries Inc.-Control-United Transports, Inc., 85 M.C.C. 673,675). As the Commission noted in Pennyslvania Railroad, "the parent, by reason of ownership has the legal right to direct the affairs of the subsidiaries and the latter have no alternative but to accept this direction, even if such were to result* * * in complete abandonment of the subsidiaries' operations or the extinction of their corporate existence." Id. at 547. The Commission concluded in that case that the Act's mandatory protective provisions covered employees of rail carriers subsidiaries.

The Commission does not seem to contest the above conclusions; rather it contends that a third condition must be met before section 11347 is applicable-the employees of the railroad must also be railroad employees, that

is, work for the railroad itself or a rail carrier subsidiary. Although section 11347 contains no such explicit condition, the Commission refers to the previous version of that provision. 49 U.S.C. Sec. 5(2)(f). Section 5(2)(f) directed the Commission to "require a fair and equitable arrangement to protect the interests of the railroad employees affected." (Emphasis added.)[3] IN Pennsylvani Railroad Merger-New York Central Railroad, supra, 347 I.C.C. at 549, the Commission interpreted this phrase to mean that mandatory protective provisions did not extend to employees of non-rail subsidiaries. In the instant case, the Commission argues that because Congress only meant to clarify section 5(2)(f) by the rewording in section 11347 and not effect any substantive change, we should read the same restriction into the revised provision.

Congress amended section 5(2)(f) by substituting "employees who are affected by the transaction" for "railroad employees affected." We are hesitant to read into the revised provision the interpretation argued for by the Commission. If Congress meant for section 11347 to apply only to employees who worked for rail carriers and not all the employees affected by the merger, the clearest way to express this restriction would have been to leave the relevant language in section 5(2)(f) as it was.

[4] We need not resolve this question of interpretation because we believe, in the circumstances of this case, that the FTC employees are "railroad employees" within the meaning of the Act. Supreme Court and Commission decisions have traditionally limited a railroad's authority to operate motor carrier companies to auxiliary-to-rail

services unless special circumstances warranted expanded authority. See American Trucking Associations v. United States, 364 U.S. 1, 6, 80 S.Ct. 1570, 1574, 4 L.Ed.2d 1527 (1980); American Trucking Association, Inc. v. I.C.C., 722 F.2d 1243, 1244-1247 (5th Cir. 1984)(history of the auxiliary-to-rail restriction); Rock Island Motor Transit Co. comm. Car. Application, 63 M.C.C. 91(1954). The Commission determined both in the Merger Order and the Reopening Order that FTC's operations were generally restricted to service which was auxiliary to or supplemental to the Frisco rail service. FTC can thus be viewed as a part of Frisco's and, after the merger, BN's single transportation system. FTC was intimately tie to the railroad's main transportation function, in contrast to subsidiaries which are non-transporation oriented such as warehouse and mining

enterprises. FTC employees should threfore be considered railroad employees.

The Commission objects to this line of reasoning, pointing out that employees of merging motor carrier companies are treated differently under the Act than employees of railway companies. Section 11344(b) of the revised Act covers motor carrier mergers. It requires the Commission to "consider the interest of carrier employees affected by the transaction." 49 U.S.C. Sec. 11344(b)(1984). Courts have recognized that the Commission has more discretion under this section in fashioning protective conditions for affected employees than it has under section 11347. See Walters v. Roadway Express, Inc., 557 F.2d 521, 523 n. 2 (5th Cir. 1977); American Buslines, Inc. v. United States, 253 F.Supp. 481, 483 (D.D.C. 1966); Amalgamated Association of Street, Electric Railway and

Motor Coach Employees of America v. United States, 221 F.Supp. 958 (D.D.C. 1963) (applying statutory predecessors 49 U.S.C. Sec. 5(2)(c) and 5(2)(f)). The rationale for this distinction is that motor carrier employees do not need as much protection becaues their skills are more transferable than those of railway employees. American Buslines, Inc. v. United States, supra, 253 F.Supp. at 483.

The Commission cites these cases to support the proposition that section 11347 and its predecessor section 5(2)(f) have been consistently interpreted to exclude motor carrier employees. While we realize the Commission's intepretation should be given great weight, e.g. Perkins v. Matthews, 400 U.S. 379, 91 S.Ct. 431, 27 L.Ed.2d 476 (1971), we think the Commission is clearly wrong. None of the cited cases involves motor carrier

subsidiaries of railroads which exclusively operate auxiliary-to-rail services. The transactions in those cases were between motor carriers and were thus clearly covered by section 11344(b).[4] Here, however, the transaction is a merger between two railroads and the motor carrier in question is a part of one of the merging railroad's overall transportation system. Moreover, there is no evidence in the record that the skills of FTC's employees were transerable to general motor carrier services. Under the facts and circumstances of this case, we think section 11347 governs protective conditions for FTC employees.

[5] "(2) Even if it is assumed that the Commission has discretion to grant or deny protective conditions to employees of motor carriers operating at the time of merger as FTC did here, under the facts and circumstances of this case, it was an abuse of discretion not to grant the FTC employees the same protective conditions granted to Frisco's other railroad employees."

In the BN-Frisco merger proceedings, officials of the BN and the Frisco stated that only a few employees of either company would be abversely affected by the merger and that those that were affected would be protected by standard employee protective conditions. The assurances were not limited to employees of the parent companies, BN and Frisco, nor were employees of the FTC told that they would not be protected. Thus no employee of the FTC had reason to seek to intervene in the merger proceeding or to request his union to do so. Moreover, specific assurances were given that there would be no change in the operation or services to be provided by the FTC.

Louis W. Menk, Chairman of the Board and Chief Executive Officer of BN, filed a verified statement with the Commission as a part of the merger application. He stated:

"The public interest also involves the

potential impact on the employees of the two companies. Overall, because of the higher traffic volumes, it is expected that there will be a slight increase in employment over that of the two roads in 1976. * * * I would like to emphasize that, because of labor protective conditions, 'no employee will face involuntary unemployment as a direct result of this merger without ample financial protection.'"

Verified Statement of L.W. Menk, pp.11-12 (emphasis added).

R.C. Grayson, Chairman, Chief Executive Officer and President of Frisco, also filed a verified statement with the Commission as part of the merger application. He stated:

"The increases in traffic after 3 years will result in a slight increase in employment beacause of increased needs, especially in the states served by Frisco."* * *

* * * * *

This end-to-end merger should not result, or in itself, decrease the number of competitors anywhere. Single line service will provide financial strength and should enhance competition and aid the industry in its competitive struggle with motor carriers, water carriers, and pipelines. The effect on employment will be minimal with some reductions and transfers, primarily in the headquarters and other staff functions. Because of the end-to-end merger, reductions generally will occur through attrition and

increases in employment will primarily be in the operating area necessitated by increased traffic volume. "In fact, by three years after merger, the number of jobs on the combined system will have actually increased." Verified Statement of R.C. Grayson, pp. 8 & 20 (emphasis added).

Additional verified statements relating to employee protection were filed by the following:

M.M. Donahue, Vice President of BN:

"The proposed merger will improve the quality and efficiency of rail service offered to our shippers, 'produce no long-term adverse impact on our employees', increase the rate of utilitization and productivity of our human and physical assets, and will increase the financial strength of the consolidated company to a level exceeding that achievable by the two companies standing alone. 'The beneficiaries will include * * * the railroad industry, and the merged company's employees' and owners.

The estimated financial benefits to the merged company will total $32.5 million in the third year of operation. * * * Of course, these benefits will be diminished during the early years of merged operations when payments will be made to offset the adverse impacts 'on our employees'.

* * * * * * *

In any merger, there is some reduction in the work force of the predecessor companies. In the conduct of our merger studies, we were careful to identify potential adverse impacts on our employees. We then undertook an analysis of the protective payments and such related costs as those associated with employee transfers. Based on our analyses, it is estimated that the employee protective payments will total $16.0 million during the first year of merged operation, $7.8 million the second year, and $4.6 million the third year (in 1976 dollars)."

Verified Statement of M.M. Donahue, pp. 3 & 12 (emphasis added).

C.M. Illg, Assistant Vice President-Labor Relations of BN:

"The proposed merger of BN and Frisco is entirely end-to-end in nature with only two common points (St. Louis and Kansas City). The primary purpose of the merger is to improve the quality and efficiency of the rail services offered to our shippers, rather than elimination of duplicate routes and redundant facilities. Therefore, 'while any merger of two companies rquires some realignment of forces, this transaction is not intended to result in substantial permanent reductions in employment. * * *

With the exception of clerical employees at Springfield, it is expected that the bulk of surplus employees created at any point and in any craft will be absorbed almost immediately on new positions and other vacancies caused by employees leaving service

in the normal course of events,' and by the demands of increased traffic. Even at Springfield, where it is contemplated that a net surplus of clerical employees will result, the anticipated increased business indicates that opportunities will exist for retraining most of these surplus clerical employees for new careers in other crafts.

"Those employees who do become surplus, or are displaced or are transfered due to the transaction, will be covered by protective benefits." * * * Since it is not practicable to pursue the kind of negotiations necessary to reach protective agreements with the employee representatives prior to submitting this application, and the ultimate success of any such negotiations depends upon the ability of many parties to reach mutually satisfacotry arrangements, appropriate conditions to protect the interest of the employees to be imposed by the Commission must be considered. In light of the relatively limited impact that the proposed transaction will have on the employees, they will be adequately protected by the protective conditions provided for in Section 5(2)(f) of the Interstate Commerce Act, and the cost of protective benefits shown in Table B of Exhibit 10(iii), (iv) and (v) for employees represented by unions adversely affected by this transaction has been based on the assumed impositions by the Commission of those conditions."

Verified Statement of C.M. Illg, pp. 4-6 (emphasis added).

At the time the application for merger of the BN and Frisco was submitted, a supplement to that application was also submitted. In

describing that supplement, the BN stated:

"At the request of the Commission, we are filing herewith a supplement to the above-captioned application. The purpose of the supplement is to provide data called for in Commission Form OP-F-45 concerning the Frisco Transportation Company, a wholly owned motor carrier subsidiary of the St. Louis-San Francisco Railway Company. This supplementary information is being provided since, if the rail merger sought in the above-captioned application is approved and consummated. Burlington Northern, Inc. would then also acquire control of Frisco Transportation Company.

Burlington Northern Letter to Mr. Marvin Bober, Assistant Deputy Director, Interstate Commerce Commission, dated January 13, 1978.

The supplement stated:

"With respect to all information required as Appendix D, see the Joint Application generally Section 1111.1(a) through (3) and exhibits. With respect specifically to Appendix D-7, 'no changes are proposed in the operation of FTC.' No control will be obtained unless the rail merger proposed in the Joint Application is approved and consummated. Should that occur, 'FTC operations will continue in the same manner as at present and will bear the same relationship to Frisco rail operations as they do now.' Thus BN as successor to Frisco will be enabled to use service by motor vehicle to public advantage

in its operations to the same extent and in the same manner as Frisco does today. Neither will there be any change in the competitive relationships with respect to other motor carriers nor will competition be unduly restrained. 'If any consolidation with BN's motor carrier subsidiary is proposed in the future, a separate application will be filed with the Commission at that time.'

Supplement to Application, Finance Docket No. 285283 Sub No. 1, dated January 13, 1978, pp. 1, 6-7 (emphasis added).

[6] No studies were made by the BN or its transportation company as to the effect of the acquisition of the control of the FTC by the BN. In response to questions, an officer of the BN Transportation Company stated:

"Q [Questioning by Mr. Thomas]* *
The witnesses for the railroad have testified to various [studies], effects of the merger between BN and Frisco. Were any studies made by your or your transportation company as to the effect of the acquisition of the control of the Frisco Transportation Company by the BN?
A Not to my knowledge, no, sir.
Q You have no knowledge of how that acquisition will affect your operation?
A I know to this extent, that we are not engaged in any merger. It would be merely a change in ownership and therefore, we had no

merger study per as with BN Transportation or BN, Inc., or anybody else.

Q You assume, do you, that your operations will be conducted in the future as they are in the present?

A Absolutely.

* * * * * * *

Mr. Olsen. Your Honor, I would like to point out that all the material in the supplementary application, which pertains to acquisition of control of Frisco Transportation Company, all of the material in this application with respect to Burlington Northern is taken out of the rail merger application or out of our R-1 reports to the Commission. 'There is nothing in there beyond that other than the simple policy statement that no change will be made in the operation of Frisco Transporation.'"

Tr. 3453-3459 (emphasis added).

In the light of these facts, we cannot agree with the Commission that the petitioners waived their right to receive the benefits of the protective condition by not intervening. They had a right to rely on the representations that were made by the officers of BN and Frisco. Moreover, the petitioners offered to provide evidence of additional personal reassurances from Frisco officials

that their jobs would be safe, but the Commission declined to receive this evidence. It can hardly be heard now to say that they waived their rights by not taking an active role in merger proceedings.

SUMMARY

In our view, the FTC employees are entitled to the benefit of the protective conditions heretofore made available to the employees of the BN and the Frisco because they are employees who were affected by the merger within the meaning of the Act; and, alternatively, because it was an abuse of discretion on the part of the Commission to deny them benefits in light of the representations made by the railroads at the time of the merger.

Reversed and remanded.

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1. 49 U.S.C. Sec. 11347 provides in its entirety:

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of 'employees who are affected by' the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrierr will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period). Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1439 [Emphasis added.]

2. The provision generally does not cover employees of other railroads which might be affected by the merger. Lamoille Valley Railroad v. Interstate Commerce Commission, 711 F.2d 295, 323 (D.C. Cir. 1983); Missouri-Kansas-Texas Railroad v. United States, 632 F.2d 392, 412 (5th Cir. 1980).

3. 49 U.S.C. Sec. 5(2)(f) provides:

(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement

to protect the interests of 'the railroad employees affected'. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction shall not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees. [Emphasis added.]

4. Walters v. Roadway Express Inc., 557 F.2d 521 (5th Cir. 1977), involved the merger of two motor carrier companies. American Buslines, Inc. v. United States, 253 F.Supp. 481, 483 (D.D.C. 1966), consolidated three cases, involving the purchases of busline and motor carrier companies by other such companies. Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. United States, 221 F.Supp. 958 (D.D.C. 1963), involved the purchase of one busline by another.